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Recent Real Property Decisions

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RECENT REAL PROPERTY DECISIONS*

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HIGHLIGHTS

This report includes significant decisions in the outlined phases of real property law. No significant decisions were found by committee members in other phases.

New law continues to develop in the active landlord and tenant field. Kansas and California cases recognized an implied warranty of habitability, adding these states to the growing list of jurisdictions enunciating this doctrine. A Maryland case, *County Council for Montgomery County v. Investors Funding Corporation,*[1] found certain portions of a county landlord/tenant ordinance invalid including requirement of duplicate leases because state law permits oral leases, monetary penalties because of lack of due process, and covenants against retaliatory evictions because it violated express state law on the subject.

In condominium law, a New Jersey case, *Centex Homes Corp v. Boag,*[2] held the developer not entitled to specific performance of a contract to sell a condominium unit since damages could be readily ascertained.

Two cases on age discrimination, one involving a covenant, the other zoning, reflect that the real property field will not be exempt from litigation on this species of discrimination. In *Riley v. Stoves,*[3] the Arizona Court of Appeals upheld a private covenant on a mobile home subdivision restricting occupancy to persons 21 years or older, stating there was no denial of equal protection since the classification fulfilled a legitimate need for older buyers. In *Shepard v. Woodland Twp. Comm.,*[4] a New Jersey trial court held an amendment to a zoning ordinance relating to senior citizens communities limiting residency to persons 52 years of age or older unconstitutional since the age requirement bore no realistic relationship to a recognized objective of zoning legislation.

Fuentes v. Shevin[5] continues to foster revolutionary changes in real

*Report of Committee on Significant Decisions, Real Property Division.
[1] *Infra* 177.
[2] *Infra* 164.
[3] *Infra* 168.
[4] *Infra* 185.
[5] 407 U.S. 67 (1972).

property law. A property owner in Connecticut brought suit to enjoin prosecution of action foreclosing mechanic's liens, claiming Connecticut's statutes which provided for recording of lien but no opportunity for a hearing prior thereto violated due process. The trial court in *Roundhouse Construction Corp. v. Telesco Masons Supplies Co., Inc.*,[6] relying on *Fuentes,* issued the injunction.

In a landmark case, the Florida Supreme Court in *City of Daytona Beach v. Tona-Rama, Inc.*,[7] considered rights of the public in beaches. In a 4 to 3 decision, the court found in favor of the property owner who during the lower court trial built a sightseeing tower on the dry sand area next to his pier at Daytona Beach. The court reversed the Court of Appeals which had affirmed the trial court's finding that the public had acquired an easement by prescription and ordered removal of the tower. Daytona Beach is one of the most heavily used beaches by the public in the country. However, the court found the public's use not adverse since beach users constituted customers for the owner's pier facility.

The court further stated that even if an easement had been acquired by the public, the tower which occupied only an area of 17 feet in diameter would not interfere with such easement. In its dictum the majority opinion favorably referred to *Thornton v. Hay*[8] and *In re Ashford*[9] which used the "customary rights doctrine" to afford the public rights in beach property, stating that use of the dry sand area that has been ancient, reasonable, without interruption and free from dispute, as a matter of custom should not be interfered with by the owner. While the three dissenting judges felt the trial court's factual determination of a prescriptive easement should not be disturbed, one concurred with the majority that the tower should not be removed while the two others were willing to allow the tower to remain until the owner recouped his expenses since the tower was built pursuant to a valid building permit.

Following some of the cases reported below are italicized comments indicating their significance.

I. Adverse Possession

Wallace v. Magie, 214 Kan. 481, 522 P. 2d 989 (1974).

Remaindermen brought action seeking title to land which had been attached and sold during the life of their mother, the life tenant.

HELD: Ordinarily the attachment and sale of a life tenant's interest only entitles the buyer to a life estate *pur autre vie.* But where persons claiming under a warranty deed had been in possession of the land for 28 years, had made many improvements on it and had a good faith belief of ownership, such exclusive and continuous possession for more than 15 years, even though not hostile, entitled them to claim title under a belief of ownership.

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[6] *Infra* 181.
[7] *Infra* 193.
[8] 254 Ore. 584, 462 P.2d 671 (1969).
[9] 50 Hawaii 314, 440 P.2d 76 (1968).

Pure Oil Co. v. Skinner, 294 So. 2d 797 (La. 1974).

HELD: Parties claiming title or ownership of land against adverse claimants in possession without a deed translative of title have the burden of proving valid record title, to show title good against the world without regard to the title of the party in possession.

Overrules Hutton v. Adkins, *186 So. 908 (La. App. 1939).*

Dunnick v. Stockgrowers Bank of Monmouth 191 Neb. 307, 215 N.W. 2d 93 (1974).

Action to quiet title by Dunnick. Court quieted title in Dunnick except for a strip used as a road, which strip was quieted in the City of Dakota City in fee.

HELD: A governmental subdivision may acquire title by adverse possession even though it has power of eminent domain and under that power would have to pay just compensation for any taking. Nature of interest acquired was a fee, not merely an easement.

Three justices, concurring in the result, thought the city acquired only an easement.

Torch v. Constantino, 323 A.2d 278 (Pa. Super. Ct. 1974).

Constantino claimed title to an 0.65 acre tract of land by adverse possession, but included in the required 21-year period was a period of about 17 years during which the county owned the property by virtue of nonpayment of real estate taxes. During this period of time the property had been removed from the tax rolls. The property was sold to Torch at a tax sale and a deed was delivered to him approximately four years before Constantino recorded his claim of title by adverse possession although the quit claim deed from the county to Torch was not recorded until approximately eight months after Constantino recorded his claim.

HELD: When the land was returned to the county for nonpayment of taxes it was devoted to a governmental use since the county was acting as a trustee for the taxing district, and adverse possession does not run against the political subdivision holding land for tax sales for nonpayment of taxes.

This is the first decision by a Pennsylvania appellate court on this issue in modern times.

Foster v. Hill, 510 S.W. 2d 520 (Tenn. App. 1974).

Action for forceable entry and detainer brought by farmowner to recover title to a strip of land fenced by the adjoining landowner. The facts showed that the adjoining landowner had purchased his land from a common grantor some 14 years prior to the bringing of the suit; that the adjoining landowner knew that his line extended beyond the fence line but made no attempt to move the fence. The farmowner purchased his property some 10 years before the filing of this suit, and he testified that he thought all of the property to the fenceline was his. Immediately prior to the filing of the suit, the adjoining landowner had had his property surveyed and had erected a new fence encroaching upon the property the farmowner assumed was his. The trial court held in favor of the farmowner.

HELD: Affirmed. The rule in *Liberto v. Steele,* 188 Tenn. 529, 221 S.W.2d 701 (1949), states that, when a purchaser of land accidentally or by mistake encloses a contiguous strip, believing he is placing the fence on the boundary line, and if he holds this enclosed strip for seven years, his possession is adverse and will avail against the true owner. This rule should be extended to include not only a landowner, but a landowner's predecessor in title.

Case further extends Liberto *by stating that the rule is applicable even if the original landowner did not intend the fence to delineate a boundary line, but erected it for other purposes. See* Tenn. CODE ANN. §28-203.

II. BROKERS

Blank v. Borden, 11 Cal. 3rd 963, 115 Cal. Rptr. 31 (1974).

An exclusive right-to-sell contract contained a provision allowing broker his full commission if seller withdrew the property from sale. Broker had made diligent efforts to sell the property; however, seller withdrew property from sale.

HELD: Broker's claim is not for damages for breach of contract, but it is a claim for indebtedness under the specific terms of the contract, and broker is entitled to his full commission based on the selling price stated in the contract.

Matthews v. Greiner, 130 Ga. 817, 264 S.E.2d 749 (1974).

Real estate brokers licensed in Virginia contracted with the owners of land in Georgia to attempt, in Virginia, to procure a purchaser for the land. They later sued the landowners and a Delaware corporation claiming a conspiracy to defraud them of their commission. The trial court dismissed the action on the ground that the brokers, unlicensed in Georgia, could not enforce their claim.

HELD: Reversed. The contract was made in Virginia and was to be performed there. Enforcement of such a contract would not be in violation of the public policy of Georgia. The brokers did no business in Georgia. The Georgia statute relating to licensing of brokers and nonenforceability of claims for commissions by unlicensed brokers does not focus on the situs of the real property. It deals with services and seeks to insure that the services of brokers are trustworthy and reliable.

Anderson v. Griffith, 501 S.W.2d 695 (Tex. Civ. App. 1973).

Seller entered into a contract to sell real estate to "Anderson, Trustee." The contract provided for the payment by Seller of a real estate commission to Anderson (a licensed real estate broker) as "agent for Seller." At the time the contract was signed, Anderson had an agreement with Kelly and Hamm to convey to them a two-thirds interest in the real estate in exchange for the payment by Kelly and Hamm of the total cash downpayment and all of the property taxes and interest payments on the purchase money note for the first three years after the closing. Anderson never disclosed to Seller his agreement with Kelly and Hamm. Seller conveyed the real estate to Anderson and also paid him the real estate commission.

Simultaneously with that conveyance, Anderson conveyed a two-thirds interest in such real estate to Kelly and Hamm (and retained the remaining one-third interest). Later the real estate was sold by Anderson, Kelly and Hamm to a third party for a substantial profit. When Seller later learned of Anderson's agreement with Kelly and Hamm, Seller brought suit against Anderson to recover the real estate commission paid and Anderson's one-third of the profits realized when the real estate was subsequently sold to a third party.

HELD: Judgment for Seller. (a) Anderson's role as broker in selling the real estate for Seller caused him to be his agent. (b) An agent has the duty of imparting to his principal every material fact relating to the transactions within the scope of the agency on becoming aware of such facts during the course of the transaction. (c) The self-interest of the agent is considered a vice. Accordingly, the principal may attack the transaction even if the agent proves that the price is fair and reasonable and that there is no element of undue advantage. Nothing will defeat the principal's remedy except his own confirmation after full knowledge. (d) When an agent breaches his fiduciary obligation to his principal, he forfeits all compensation for his services as agent, and he must also account to his principal for every profit, benefit or advantage that he received out of the transaction.

House v. Erwin, 83 Wash. 2d 898 (1974).

HELD: A real estate broker's employment contract need not contain a complete legal description of the property being listed in order to satisfy the requirements of the Statute of Frauds, if the contract is clearly understandable.

As a result of this decision the cases of Helm v. Faulsitch, *70 Wash. 2d 688 (1967) and* Rogers v. Lippy, *99 Wash. 312 (1918) were overruled.*

III. Condominiums and Cooperatives

Holiday Out in America at St. Lucia, Inc. v. Bowes, 285 So. 2d 63 (Fla. App. 1973).

The owners of two condominium units in a travel trailer resort condominium sought to have a provision of the Declaration of Condominium, requiring that all rentals of any units should exclusively be undertaken by the developer of the travel trailer park, and that the developer would receive a percentage of all rentals in accordance with a schedule promulgated by the developer for undertaking such rental, declared void as being in violation of the rule against illegal restraints on alienation.

HELD: The aforesaid provision does not constitute a restraint on alienation. The fact that the property may be less desirable (and hence less valuable) than would be the case if not subject to the rental restrictions does not constitute a restraint upon alienation.

Case of first impression.

Centex Homes Corp. v. Boag, 128 N.J. Super. 385, 320 A.2d 194 (1974).

Action for specific performance brought by sponsor of condominium

project against contract vendee who stopped payment on check given for balance of down payment.

HELD: Specific performance would not be granted as regards contract to purchase condominium apartment where damages sustained by sponsor as breach of sales agreement were readily measurable and damage remedy at law was wholly adequate.

Case of first impression on whether the equitable remedy of specific importance will lie for the enforcement of a contract for the sale of a condominium apartment.

IV. Conveyancing and Titles

River Farms, Inc., v. Fountain, 21 Ariz. App. 504, 520 P.2d 1181 (1974).

Action to quiet title to land adjacent to the Colorado River. The opposing parties held conflicting Arizona and California deeds. Due to periodic shifts in the course of the Colorado River, jurisdiction of each state was in question. The Arizona-California Boundary Compact of 1922 attempted to resolve the jurisdictional question. An Arizona implementing statute provides that documents affecting the lands in question that had been recorded in California might also be recorded in Arizona with retroactive effect to the date of recording in California.

HELD: Deeds and certain other documents, including records of tax payments, may be recorded in Arizona with retroactive effect if the land to which they relate was ceded to Arizona by the Compact. If the applicable deed bears a description in terms of California townships and ranges referenced to a California baseline and meridian, the land may be "considered" to have been part of California for purposes of the Compact and implementing statutes.

Foerster v. Foerster, 300 So. 2d 33 (Fla. App. 1974).

A husband and wife held title to homestead property as tenants by the entireties. The husband purported to convey the title to the property to the wife in a deed executed by the husband without joinder by the wife. Such a conveyance was authorized by Fla. Stat. §689.11(1) (1971), which provides that "a conveyance of real estate, including homestead, made by one spouse to the other shall convey legal title to the grantee spouse in all cases which it would be effectual if the parties were not married and the grantee need not execute the conveyance. . . ." In a divorce proceeding the effectiveness of the conveyance was challengd by the husband.

HELD: The conveyance was void as violative of Article X, section 4 (C) of the Florida Constitution. Section 689.11(1) is unconstitutional in so far as it applies to the conveyance of homestead property.

Reid v. Bradshaw, 302 So. 2d 180 (Fla. App. 1974).

In November 1929, husband, while living on the subject property with his family as his homestead, and having children, heirs of his body, and a wife living with him, executed a deed of the homestead property to his wife. Since there was no joinder by the wife in the deed, the conveyance

was void as being in violation of the Florida constitutional provision regarding alienation of homestead property. The wife's grantee brought a quiet title action alleging the aforesaid conveyance as the root of title under the Marketable Record Title Act. Although the conveyance alleged as the root of title was a void deed, the wife's grantee relied upon *Marshall v. Hollywood, Inc.* 236 So. 2d 114 (Fla. 1970), which held that the void deed can constitute a valid root of title under the Marketable Record Title Act.

HELD: Where the root of title is a conveyance void as violative of constitutional restrictions as to the alienation of homestead property, the Marketable Record Title act will not extinguish the claims and homestead rights of heirs. The deed which was fixed as the root of title was so irregular as to constitute a defect which was inherent in the recorded transaction which is the muniment of title on which said estate is based beginning with the root of title. In *Marshall* the root of title was from a forged deed and the real estate was not homestead.

The decision raises a question as to the effect of the Marketable Record Title Act in regard to the extinguishment of rights and claims pertaining to homestead property. The case of Marshall v. Hollywood, supra, *is specifically distinguished, in that a deed violative of constitutional provisions regarding homestead cannot serve as a root of title. However, other language in the decision appears to be contradictory, and to call into question whether or not the Marketable Record Title Act can affect homestead rights at all. It is stated in the decision that as to the "question whether or not Chapter 712 has the effect of nullifying homestead interests, it is our finding and we so hold that in the absence of some overt act constituting an abandonment on the part of those claiming such homestead rights, the homestead right still exists. The mere lapse of time alone does not wipe out these rights." However, the decision also contains dicta that "it was the allegation in the complaint that fixed the root of title in the 1929 deed, which was so irregular as to raise a red flag as to homestead rights accruing to the heirs of the grantor in said deed. Had the root of title been fixed in the 1938 deed, it is probable that the same red flag would not have been raised and probably the Marketable Record Title of Real Property Act would have been conveyed by the* Marshall *decision."*

Kearney v. Maloney, 296 So. 2d 865 (La. App. 1974).

HELD: Where vendor affirmatively misrepresents condition of home, the vendee has an option of bringing either an action in redhibition or an action to rescind the contract. The prescription on the action in redhibition is one year, while the rescission can be brought within five years.

On limited rehearing — Any action against the lender, who also knew of the defect, must be brought within the one-year prescriptive period. There is no contractual relationship to inspect the premises for soundness.

Wheeler v. Monroe, 86 N.M. 296, 523 P. 2d 540 (1974).

Suit in ejectment to oust purchasers from lands designated as a public park on subdivision plat which, after nonuse as a park, was sold by the city to a contractor who subdivided the former park property, built houses thereon and sold them to the several purchasers.

HELD: Dedication of land for public park by the filing of a subdivision plat and its acceptance by the city vests title in the municipality in fee simple, unless the dedication contains conditional language or a reservation in the grantor of a present or future interest. No exact language is required to create a determinable fee or a condition subsequent, but there must be a clear indication in the dedication of an intent that an interest is given or granted as a determinable fee or on condition subsequent. The plat in question merely recites the purpose for which the property was to be used and contained no language creating an effective right of re-entry or possibility of reverter.

Earlier decisions of the court were overruled.

Picerne v. Sylvestre, 324, A.2d 617 (R.I. 1974).

Although the residence of the Sylvestres in 1960 was sold by the city at tax sale to Picerne, the Sylvestres continued their residence therein up to October 4, 1971, when Picerne petitioned to foreclose their right of redemption. Picerne, although paying the taxes, did not seek rent or possession. The Sylvestres pleaded adverse possession.

HELD: Remanded for further proceedings. The tax deed conveyed absolute title, subject only to defeasance by redemption. The lower court erred in barring the defense of adverse possession. The holder of a tax title who procrastinates in foreclosing the right of redemption runs the risk of having his title divested by a successful showing of the requisite adverse possession.

Roeber v. DuBose, 510 S.W. 2d 126 (Tex. Civ. App. 1974).

Seller and Buyer entered into contract to sell real estate. Before it could be closed, Seller died. Seller's daughter inherited the real estate but refused to sell it to Buyer even though Buyer was ready, willing and able to perform. Buyer brought suit for specific performance against Seller's daughter and her husband for purpose of forcing them to convey the real estate to Buyer by means of general warranty deed.

HELD: Specific performance granted to Buyer against Seller's daughter (only), and the deed to be signed by Seller's daughter would be without warranty. Seller's daughter could not be required to execute a general warranty deed since this would impose upon her liability under a contract which she had not executed and to which she was not a party. Specific performance is not granted against the husband of Seller's daughter since he did not own or claim any interest in the land.

Shaffer v. Mareve Oil Corp., 204 S.E. 2d 404 (W. Va. 1974).

Lessor got tax deed for mineral interest in 29-acre tract of real estate in 1947. He examined title and certified to clerk the name of the owner as required by statute, but named owner had been dead for three years and her heirs were actual owners. Notice was served by publication on deceased owner, but no notice was served on her heirs. Her heirs redeemed property in 1971 and sought accounting for oil produced from wells on property.

HELD: Lessor's failure to furnish names of actual owners was jurisdictional defect, but short statute of limitations (three years) for actions

to set aside the sale or deed applies to both jurisdictional and nonjurisdictional defects. Possession of property is not necessary to start running of short statute of limitations.

Court adopted minority view on both points.

V. COVENANTS

Riley v. Stoves, 526 P. 2d 747 (Ariz. 1974).

Action by owners of lots in a mobile home subdivision to enforce a private covenant restricting occupancy of a portion of the subdivision to persons 21 years of age and over.

HELD: The classification fulfilled a legitimate need for older buyers and was not an unreasonable denial of equal protection.

Case of first impression.

House v. James, 232 Ga. 443 (1974).

Action to enjoin the proposed use of house as law office, contrary to restrictive covenant (recorded in 1925) limiting use for residential purposes only. Prior approval for the use of the house as a law office was given by the county planning and zoning commission, which commission had been established more han 20 years prior to the initiation of the suit.

GA. CODE §29-301 as amended, adopted in 1935, provides that covenants restricting lands to certain uses shall not run for more than 20 years in municipalities which have adopted zoning laws. It is claimed that this proviso is not applicable to restrictive covenants created prior to 1935, and that its application to such covenants created prior to that date violates the state and federal constitutional provisions which bar the passage of any law impairing the obligation of contracts.

HELD: (1) The Georgia constitutional provision authorizing the state legislature to grant zoning and planning powers to municipalities, and the act of the legislature authorizing each municipality to adopt building restriction regulations, take precedence over prior covenants in conflict therewith, and (2) restrictive covenants which have run more than 20 years within a municipality or county in which zoning laws have been in effect for more than 20 years are rendered unenforceable under section 29-301.

Bob Layne Contractors, Inc. v. Buennagel, 301 N.E.2d (Ind. App. 1973).

Action by owners of lots in platted subdivision subject to restrictive covenants applicable to all lots in the subdivision. The developer still owned some of the lots near a new freeway and, pursuant to Indiana statutes, vacated the plat as to these lots. Developer then sought to use these lots for purposes contrary to the restrictive covenants on the basis that the plat as to these lots had been vacated pursuant to statute, but was restrained by court order.

HELD: Affirmed. Statutory vacation does not dissolve vested, contractual restrictive covenants incorporated in the plat and running with the land. As in the cases of rezoning or annexation, private deed restrictions are not affected by vacating all or part of the plat.

Pulos v. James, 302 N.E. 2d 768 (Ind. 1973).

Prior to 1965, lots in a platted subdivision were subject to restrictive covenants for residential use only. Pursuant to an Indiana statute enacted in 1965 (18-5-10-41), the planning commission of the county had vacated the restrictive covenants as to certain lots which were found to be more suitable for commercial use. Owners of lots subject to the restriction sought a declaratory judgment attacking the constitutionality of the Indiana statute.

HELD: A restrictive covenant running with the land is a property right of the benefitted owners, and such property cannot be taken for private use–*i.e.,* to benefit other private owners such as the owners of the lots for which the planning commission had vacated the restrictions.

Gulf Oil Corp. v. Fall River Housing Authority, 306 N.E. 2d 257 (Mass. 1974).

Bill in equity brought by owner of gasoline service station to enforce restrictions in a land assembly and redevelopment plan which, it was alleged, prevented the operation of a service station by a competitor in another area of the project.

HELD: The provisions of the redevelopment plan prohibited the operation of competitor's service station, service station owner had standing to bring its action even though it acquired its land before the deed restrictions of the plan became a part of competitor's chain of title, the restrictive provisions "touched and concerned" the land and were valid and enforceable despite their tendancy to restrict competition.

Distinguishes previous cases holding that anti-competitive covenants do not run with the land on ground that this restriction was imposed by the authority to assure orderly and mutually beneficial development of entire area. It was not intended to grant monopoly to a particular landowner.

Hoffman v. Cohen, 202 S.E. 2d 363 (S.C. 1974).

Landowner instituted action for declaratory judgment that building of 62-unit high-rise residential condominium would not violate ancient covenants restricting subdivision to "residential purposes."

HELD: Building of condominium would be inconsistent with the overall scheme of the subdivision, would involve undesirable characteristics incident to a commercial undertaking and would violate the restriction.

Case of first impression.

Bullock v. Kattner, 502 S.W. 2d 828 (Tex. Civ. App. 1973).

All lots in the subdivision were subject to a restriction providing no trailer shall at any time be used as a residence temporarily or permanently. Lotowner moved a housetrailer onto his lot, removed the wheels and permanently connected the trailer to the lot by means of water pipes, electricity lines and block foundations. Suit was brought to enforce the restriction. Lotowner, admitting that he had placed a mobile home on his lot, contended that it was not a trailer within the meaning of the restriction.

HELD: A trailer, sans wheels, placed on blocks and hooked to light and water is still a trailer under the restriction, even though it may also

be a mobile home. Temporary or permanent, it is the type of structure that the restriction attempts to exclude.

Atkins v. Fine, 508 S.W. 2d 131 (Tex. Civ. App. 1974).

Restrictions in subdivision provided that "no building of any character are to be moved onto said property herein conveyed except new ready-built homes." Lotowner purchased a mobile home and moved it onto one of the restricted lots and removed its wheels, bolted it to a concrete foundation and added improvements. Suit was brought seeking a mandatory injunction ordering the removal of the mobile home.

HELD: The moving of the mobile home onto the property was in violation of the restrictions for the reason that it was not a "ready-built" home. A "ready-built" home is the only type of building that may be moved onto the property. Other types of buildings on the property must be constructed there.

VI. EASEMENTS

Arizona R.C.I.A. Lands, Inc. v. Ainsworth, 21 Ariz. App. 38, 515 P.2d 335 (1973).

Action by purchaser of land at a tax sale to compel record title holder of an easement for access over the subject property to redeem or be foreclosed from any right of redemption. ARIZ. REV. STAT. §42-390 provided that, "A sale of real property for delinquent taxes shall not extinguish any easement thereon or appurtenant thereto."

HELD: The tax sale passed fee simple title subject to the existing easement, the easement was not extinguished by the tax sale, the owner of an easement cannot be forced to redeem the fee simple of the servient estate in order to preserve his easement, and none of the purchaser's constitutional rights had been denied.

Follows majority rule, but a case of first impression in Arizona.

Gilmore v. New Beck Levee District, Harrison County, 212 N.W. 2d 477 (Iowa 1973).

A drainage district was established with the knowledge of owner's predecessor in title and a drainage levee was constructed on property. Later the Board of Supervisors, acting under a statute, constructed a road upon the levee with notice to the owner. Owner conceded the easement with respect to the levee, but not for the road which was constructed after his purchase.

HELD: Without evidence that owner had actual notice of an easement or that constructive notice was given by compliance with the Iowa recording statutes, no easement rights were acquired with respect to the public road on the levee.

Harrison v. Louisiana Power & Light Co., 288 So. 2d 37 (La. 1973).

Utility company constructed power lines, which encroached upon landowner's property. Landowner acknowledged that he could not prevent the construction, but protested said construction. In defense of suit to have poles removed, the utility company argued for application of the St.

Julien doctrine (*St. Julien v. Morgan L. & T. R. Co.*, 35 La. App. 924 (1883)), whereby an extra-statutory means of acquiring a servitude is created when it is determined that a person acquiesced in the use and occupancy of his land by a quasi-public body.

HELD: On the facts the St. Julien doctrine could not be used because the acknowledgement did not amount to acquiescence. The encroachments must be removed.

Wilson v. Chestnut, 31 St. Rep. 606 (Mont. 1974).

An access road to property owner's land crossed adjoining landowner's land. The road has been in existence for 50 years and has been well-defined and well-marked for many years. Property owner purchased his land in 1972 under contract for deed. Shortly after he purchased the ranch he began a real estate development, and adjoining landowner, realizing the possibility of an increased burden on the roadway, constructed a locked gate across the road. The trial court found for property owner under the holding of previous Montana cases that to establish an easement by prescription, the party claiming it must show open, notorious, exclusive, adverse, continuous and uninterrupted use of the easement claimed for the full statutory period. Also, if the claimant can establish open, visible, continuous and unmolested use of the land for the statutory period, the use will be presumed to be under a claim of right and not by a license of the owner.

HELD: Any such presumption had been overcome in this case by evidence of permissive use at the beginning, which permissive use could not ripen into an adverse use. The claimant must give notice of an adverse user and the user must continue thereafter for the statutory period.

Vogel v. Haas, 322 A. 2d 107 (Pa. 1974).

A recorded plan of lots referred to a 50-foot wide area thereon marked by dotted lines and entitled "Reserved for Future Street." The street was never opened for public use nor accepted as such by any public authority. However, each deed to purchaser within the subdivision referred to a lot number corresponding to that on the recorded plan and also to the recorded plan. Two property owners attempted to open two separate parts of the street leading from their land to nearby streets which were open and in use and other property owners in the subdivision objected and obstructed their efforts. Property owners sought an injunction to enjoin the interference.

HELD: The property owner acquired a private easement to use the street by virtue of the reference to a street in the recorded plan.

Briarcliffe Acres v. Briarcliffe Realty Co., 206 S.E. 2d 886 (S.C. 1974).

Owners of real estate within a subdivision brought action to enjoin developer of subdivision from interfering with eleemosynary corporation's right to manage and control common areas in the subdivision.

HELD: Declaration of corporate developer vesting management and control of common areas in eleemosynary corporation granted nonrevocable easement in perpetutity to use and control of common areas.

Case of first impression.

VII. Ecology and Environmental Control

New Haven v. Public Utilities Commission, 35 Conn. L.J. No. 11, p. 9. (Supreme Ct., Oct. Term, 1973.)

Appeal from judgment of Court of Common Pleas, dismissing appeal from order of the Public Utilities Commission granting application of utilities for approval of construction of electrical transmission lines. Private owners claim power lines and towers will affect their property and will injure the "public trust" in the state's and the city's natural resources.

HELD: Affirmed. Private owners are not aggrieved parties under Connecticut law, as they do not have a specific personal and legal interest in the subject matter, as distinguished from a general interest such as is the concern of the community as a whole. Reliance on *Scenic Hudson Preservation Conference v. Federal Power Commission,* 354 F.2d 608 (2d Cir.) is unsupportable, as standing in that case is based upon the Federal Power Act, 16 U.S.C. §852(b) which is inapplicable here. Even under other federal authorities, there has been a failure to meet the burden of proof of "injury in fact," actual or potential, as required by *Sierra Club v. Morton,* 405 U.S. 727, 734, and other relevant federal authorities.

Case of first impression in Connecticut which does not differ from rule of federal authorities, although Connecticut rule of aggrievement is applied.

VIII. Eminent Domain

Aaron v. City of Los Angeles, 40 Cal. App. 3rd 471, 115 Cal. Rptr. 162 (1974).

Owners of property in the neighborhood of an airport sued for damages to their residential property resulting from reductions in market value due to the noise of jet aircraft taking off and landing at the airport.

HELD: A municipal operator of an airport is liable for such damages when the aircraft causes a substantial interference with the use and enjoyment of the property and the interference is sufficiently direct and peculiar that the owner, if uncompensated, would pay more than his proper share to the public undertaking.

Holds municipality liable in inverse condemnation for airport noise.

State Department of Transportation v. Stubbs, 285 So. 2d 1 (Fla. 1973) (rehearing denied).

HELD: Ease and facility of access constitute valuable property rights for which an owner is entitled to be adequately compensated. Even though some right of access is still available to the property owner, a question of fact for the jury remains as to whether there has been a substantial diminution in access as a result of the taking. Even though "access" as a property interest does not presently include a right to traffic flow, even though commercial property might very well suffer adverse economic effects as a result of the diminution in traffic, the right to introduce evidence at a trial of severance damages resulting from physical impairment of access rather than an impairment in traffic flow should be allowed.

An apparent expansion by the court of what constitutes taking with regard to access, specifically overruling any language contained in Jahoda

v. State Road Department, *106 So. 2d 870 (Fla. App. 1958), which conflicts with the subject decision.*

Indiana & Michigan Electric Co. v. Schnuck, 298 N.E.2d 436 (Ind. 1973).

Electric company filed a complaint to condemn an easement on land owned by landowner and in which the town of Santa Claus, Indiana, claimed a contractual interest. The condemnation was sought for the purpose of building an electrical transmission line for which the company had no present immediate need nor any fair and reasonable future need.

HELD: The electric company had no right to condemn land for which it had no present immediate need, nor any fair and reasonable future need, for a transmission line. The attempted condemnation was based upon the company's speculation as to what they might want to do in the future. In addition, it was a need, if any, of the company's parent corporation and not that of the company bringing the action. The company seeking condemnation must stand on its own needs and not rely on the needs of its parent organization.

Vine Street Corp. v. City of Council Bluffs, 220 N.W. 2d 860 (Iowa 1974).

City condemned service station site to make way for an urban renewal project. Owner appealed from the jury award at the condemnation proceedings claiming that the court erred in admitting certain evidence.

HELD: Evidence inadmissable showing: (1) assessed valuation of the condemned property; (2) number of owners in the path of the same project who conveyed their property without condemnation; and (3) value of the property, based on existing use instead of its highest and best use.

In re Bangor Hydro-Electric Co., 314 A.2d 800 (Me. 1974).

The Maine Public Utilities Commission (P.U.C.) approved an eminent domain taking by the Bangor Hydro-Electric Company of an easement over private land for the purpose of erecting a transmission line. The easement would have bisected a private 150-acre tree farm with a strip of land 100 feet wide and 3,400 feet long, and the landowner appealed the decision of the P.U.C., claiming that the transmission line could have been constructed on alternative routes which would have resulted in less ecological and aesthetic damage.

HELD: (1) Under the applicable eminent domain statute, it is the responsibility of the P.U.C. not only to determine that a taking is necessary but also to determine independently whether the location of the proposed taking is proper in terms of the public interest; and (2) such determination should include consideration of all the factors relative to the public interest, including particularly ecological considerations and the feasibility of alternative locations for the taking.

Case of first impression.

Pool Beach Association v. City of Biddeford (Me. 1974).

Landowners of some beach front property appealed a taking by city of Biddeford under 30 ME. REV. STAT. ANN. §4001, which authorizes the taking of property for use as a public park and playground. Although

the landowners had all received notice by certified mail or had actual prior notice of the city's intent to take the beach property, they appealed on the contention that "notice" deficiencies in the statute rendered it unconstitutional in all its applications.

HELD: Presuming that the legislature intends its enactments to meet constitutional standards, the statute is construed to require that the record owners of legally protected interests in the land taken be given the constitutional personal notice necessary before a binding judicial determination can result. The taking in this case was not invalid for lack of a personal notice requirement in the statute. In dealing with a statute under constitutional attack for a failure to require personal notice to persons who are to suffer deprivation of liberty or property, the statute will be read as requiring constitutional personal notice "unless the express language of the statute plainly, unequivocally, and without need to invoke processes of inference establishes beyond rational doubt a legislative intention to dispense with such notice (notwithstanding that it may be constitutionally requisite)."

Montgomery County v. Old Farm Swim Club, Inc., 270 Md. 708, 313 A.2d 458 (1974).

County appealed an evidence ruling in a condemnation case. Over the county's objection, expert testimony was introduced as to the unit value of certain trees on the property taken. Not readily removable, the trees were destroyed.

HELD: Admission of unit value was prejudicial error since the nonremovable trees had no readily ascertainable value. The true test for the value of the trees was the extent to which the trees enhanced the remaining property.

Missouri State Park Board v. McDaniel, 513 S.W. 2d 447 (Mo. 1974).

HELD: Where a condemnation proceeding is abandoned, the state is liable to private landowners for interest on unpaid condemnation awards measured from the date of the filing of the official condemnation report to the date of abandonment. The state had been three years in completing its proceeding.

Upholds the validity of MO. REV. STAT. *§523.045 (1969).*

Miller v. Federal Land Bank of Spokane, 371 F. Supp. 1105 (D. Mont. 1974).

A farm loan mortgage provided that "if any of the mortgaged property shall be taken under the right of eminent domain, the mortgagee shall be entitled at its option to receive all compensation for the portion taken and damages to the remaining portion. . . ." The Burlington Northern, Inc. filed a condemnation action against 8.095 acres of the same land for the purpose of building a railroad track. A settlement was negotiated and a settlement check was allocated to land in the amount of $4,708 and to damages in the amount of $26,601.

HELD: The land was not taken under a judicially determined right of eminent domain and so does not fall within the terms of the mortgage provisions. In preparing the clause, mortgagee should have included lan-

guage defining out-of-court settlements arising in condemnation actions as compensation for property taken under the right of eminent domain.

Czarnick v. Loup River Public Power District, 190 Neb. 521, 209 N.W. 2d 595 (1973).

Suit by landowner for injunction to restrain condemnor from damaging landowner's property.

HELD: Injunction will issue, even though statute of limitations for damage action has run. Standard for issuing the injunction need not balance harm to landowner against benefit to the public. Test is merely whether injury is continuous and irreparable.

Lienemann v. City of Omaha, 191 Neb. 442, 215 N.W.2d 893 (1974).

HELD: Evidence of assessed value of real estate for realty tax purposes is not admissible in action for damages on account of condemnation.

Case of first impression in Nebraska, following the majority rule.

Commonwealth v. Securda & Co., Inc., 329 A.2d 296 (Pa. 1974).

A property owner, an owner of vacant building lots partially within the recorded right-of-way, filed a petition for the appointment of viewers alleging that there had been a de facto taking of its property to which the Pennsylvania Department of Transportation (D.O.T.) filed preliminary objections. D.O.T. had purchased or condemned all properties totally within the right-of-way lines, but had postponed acquisition of properties partially within the right-of-way lines pending approval of the design plans by the Governor. Property owner claimed that there had been a de facto taking of these properties.

HELD: No de facto taking occurred under section 502(e) of the Pennsylvania Eminent Domain Code of 1964 since there was no interference with access to property owner's remaining lots and property owner was not threatened with actual loss of its property.

Rittle v. Urban Redevelopment Authority of Pittsburgh, (Common Pleas Court, Allegheny County, Pa. 1974).

The Urban Redevelopment Authority of Pittsburgh (Authority) presented a proposal known as the Manchester Project for a "blighted" area of the city of Pittsburgh which was approved by the Council of the city of Pittsburgh. The Department of Housing and Urban Development of the federal government allocated financing for the acquisition of properties. The Authority began acquiring properties in the designated area. Landowner Rittle, who had been engaged in the real estate business in the Manchester area for about 35 years, testified that the Authority's activities had caused tenants to vacate properties making it necessary to board up structures to prevent vandalism and that sales of properties were virtually impossible because of the cloud of condemnation. Rittle, alleging that an inverse condemnation had occurred, filed a petition for viewers under the Eminent Domain Code. Three years expired between the Authority's proposal to acquire Rittle's property and the mailing to him of an offer to purchase and agreement of sale.

HELD: The Authority's acts amounted to a de facto condemnation of the property.

Vecchione v. Township of Cheltenham, 320 A.2d 853 (Pa. Commonwealth Court 1974).

A first class township condemned property for a sanitary landfill and for enlarging and maintaining the township's public park, recreational areas and facilities. The plaintiff condemnees challenged the failure of the Pennsylvania Eminent Domain Code to provide for a hearing prior to the filing of a declaration of taking which vests title to the condemned property in the condemnor as being in violation of the due process clause of the United States and Pennsylvania Constitutions.

HELD: The failure of the Pennsylvania Eminent Domain Code to provide a hearing prior to the filing of a declaration of taking was not violative of the due process requirements of the United States or Pennsylvania Constitution.

IX. Future Interests

Harvey v. Harvey, 215 Kan. 472, 524 P. 2d 1187 (1974).

Action by son to declare certain portions of his mother's will null and void because of an illegal restraint on alienation.

HELD: A restriction against selling property until the grandchildren (who take the property after a life estate in their parents) reach the age of 25 is an illegal restraint on alienation, but the dominant scheme of the testatrix can be enforced by excising the invalid parts of the will rather than declaring the whole instrument null and void.

X. Landlord and Tenant

Green v. Superior Court, 111 Cal. Rptr. 704 (Super. Ct. 1974).

HELD: There is an implied warranty of habitability in residential leases. Tenant may raise breach of this warranty as a defense to a summary eviction action brought by the landlord for withholding of the rent.

Palm Beach Mobile Homes, Inc. v. Strong, 300 So.2d 81 (Fla. 1974).

Section 83.69 provides basically that a mobile home park owner may not evict a mobile home dweller for reasons other than nonpayment of rent, violation of some federal, state or local ordinance which may be deemed detrimental to the safety and welfare of others in the mobile home park, or violations of any rule or regulation established by the owner, provided that the mobile home owner receive written notice of the violation at least 30 days prior to the date he is required to vacate. The mobile home park owner alleged that the statute in question was unconstitutional as being arbitrary and unreasonable regulation by the state, constituting a deprivation of property rights without due process, impairment of contractual obligation, and a violation of the equal protection clause of the Florida Constitution.

HELD: The statute is constitutional. The classification of mobile home park owners as distingiushed from other landlords is reasonable and

practical in light of the peculiar problems confronting mobile home owners, such as the large expense of moving a mobile home and the fact that such expense cannot easily be borne by a large majority of mobile home owners. The statute involved constitutes a reasonable and necessary regulation in view of the peculiar nature and problems presented by mobile homes. However, recognizing the fact that perpetual occupancy rights on another's property cannot, consistent with the Constitution, be granted by law, a rule adopted by mobile home park owner requiring vacancy on at least 12 months notice would be reasonable. Anything less than 12 months would be unreasonable.

Establishes the relationship between mobile home park owners and mobile home owners as a peculiar landlord-tenant relationship, subject to special rules, and also, apparently, establishes a minimum notice period for termination of tenancy in a mobile home park of one year, except in the cases of default for nonpayment of rent, violation of law or violation of reasonable rules and regulations established by the park owner.

Steele v. Latimer, 214 Kan. 329, 521 P.2d 304 (1974).

Single-family dwelling tenant in the city of Wichita sued her urban landlord for a breach of the implied covenant of quiet enjoyment under a month-to-month oral tenancy. The breach was alleged to have occurred from a failure to repair broken water main as well as neglect of other safety and sanitary maintenance duties within the dwelling.

HELD: Modern leasehold relationships are contractual in nature and, therefore, incorporate by implication the minimum housing standards of the city. Since the standards establish conditions for human habitability, failing to meet them constitutes a breach of the implied warranty of habitability. Where a breach of an implied warranty has occurred, the usual remedies of breach of contract are available, including the recovering of damages proximately resulting from the breach.

Kansas joins growing number of jurisdictions recognizing the implied warranty of habitability in urban leasehold relationships.

County Council for Montgomery County v. Investors Funding Corp., 270 Md. 403, 312 A. 2d 225 (1973).

Validity of county landlord-tenant ordinance is challenged. The ordinance, among other things, required return of security deposits under certain circumstances, duplicate leases (with copy furnished to tenant), express covenants against retaliatory evictions and payment of civil monetary penalties.

HELD: Certain parts of the ordinance violated state law and must be stricken. Duplicate leases cannot be required by local ordinances where state law and common law of the state permit oral leases. The civil monetary penalties imposed by the ordinance lacked due process safeguards. However, given the proper safeguards, the civil sanctions could be valid. The express covenants against retaliatory evictions violated express provisions of state law on the same subject. The required return of security deposits was properly being handled by an administrative agency and is valid.

Lincoln Crest Realty, Inc. v. Standard Apartment Development of West Allis, Inc., 61 Wis. 2d 4, 211 N.W.2d 501 (1973).

The owner of an apartment complex leased same to the lessee. The latter secured its performance under the lease by an assignment of the rentals to be derived from the subtenants of leased apartment units. Lessee defaulted and the owner declared the lease terminated on January 26, 1971, and in this action claimed rentals from that date on the basis of the assignment of rentals.

HELD: The owner could not rely on a self-declared lease termination to activate the assignment. Wisconsin, following the "lien theory" of mortgages, holds the right to rents and profits is an incident of possession. Until possession was regained by the owner, either by taking actual possession, by appointment of a receiver, or by declaration of constructive possession or a lease termination date by court order, the owner-lessor is not entitled to rents arising from possession.

Case of first impression extending the "lien theory" doctrine of mortgages to assignment of rentals given to secure lease obligations.

Building Owners v. Adamany, 64 Wis. 2d 280, 219 N.W.2d 274 (1974).

Newly enacted Wisconsin statute, section 539, ch. 90 (1973), provides, *inter alia*, "each owner of property in this state which is rented for use by others shall reduce that portion of the . . . [rental] due to property taxes on that property by [a proportional amount] equal to [the reduction in property taxes from the preceding year]."

HELD: The statute violates the contract clauses of the Wisconsin and United States Constitutions as enforcement would require landlords to collect less rent than the subject leases obligate the lessees to pay.

XI. Mines and Minerals

Transwestern Pipeline Co. v. Kerr-McGee Corp., 492 F. 2d 878 (10th Cir. 1974).

Action by pipeline company against the United States and the holder of a mineral lease (Kerr-McGee) to prevent mining which could cause the surface to subside. In 1954, Department of Interior had given a mineral lease to Kerr-McGee's predecessor. In 1959, pipeline company was granted a right of way for a pipeline through the lands, and in 1962 a patent was issued to it, subject to reservation by the United States of the mineral estate.

HELD: Fact that lessee of mineral rights had been granted exclusive right to mine, and fact that pipeline company, owner of the surface, had acquired the land subject to existing rights defeated pipeline company's claim to surface support. Pipeline company may not maintain an action against Kerr-McGee through exercise of eminent domain for protection of surface support, because such action would in effect be a condemnation action against the United States, as an indispensable party, whose consent must be first obtained to a suit. Where the United States reserves the mineral estate, together with the right to mine and remove the same, in a grant of the surface estate, there is a servitude laid on the surface estate for the benefit of the mineral estate.

The priority of mineral rights over surface rights in public lands is here set forth.

Christman v. Emineth, 212 N.W. 2d 543 (N.D. 1973).

A statute provided "all deeds and transfers of real property in this state that reserved to grantor the coal in said property shall contain an accurate description of the coal reserved to grantor, its nature, length, width and thickness. The coal reserved to grantor shall be limited to such description. . ."

HELD: Words "all oil, gas and other minerals" in deed reserving to grantor such interests included lignite coal. Such deed was within purview of statutes requiring that deed reserving to grantor rights in coal accurately describe coal reserved. Such statutes deny equal protection.

XII. MORTGAGES AND LIENS

Maryland National Insurance Co. v. Ozzie Young Drilling Co., 526 P. 2d 402 (Ariz. 1974).

Action for execution of a judgment lien against real property. A homestead exemption was filed upon the property subsequent to the attempted execution, and the trial court ordered a stay of execution. ARIZ. REV. STAT. §33-1103 provides for exclusion from the homestead exemption of the following debts: (1) a duly executed mortgage, deed of trust or security agreement on a mobile home; and (2) a lien for labor or material that attached before the property was claimed as a homestead.

HELD: The protected classes have a special relationship to the property, and the preferential classification is not so arbitrary and unreasonable as to render the statute unconstitutional.

Case of first impression.

Meyers v. Home Savings and Loan, 38 Cal. App. 3d 544, 113 Cal. Reptr. 358 (1974).

This class action alleged that prepayment penalty provisions in real estate contracts were liquidated damages in violation of CAL. CIV. CODE §1670 and therefore void. Section 1670 provides that every contract by which the damages to be paid for breach of an obligation are determined in anticipation thereof is void.

HELD: The prepayment penalties are not connected with any breach of the obligation and therefore do not come within the provisions of section 1670. It is simply an option given the borrower to pay the obligation in a different manner than originally specified.

Prunty v. Bank of America, 37 Cal. App. 3d 430, 112 Cal. Reptr. 370 (1974).

A construction loan was made for the purpose of constructing a residence. The residence was later demolished by a landslide. Owner sought a declaratory judgment to prevent mortgagee from obtaining a deficiency judgment.

HELD: A loan which is in fact used to pay the purchase price of a

dwelling is a purchase money loan under the anti-deficiency provisions of CAL. CODE CIV. PROC. §580b and no deficiency may be recovered.

New law on anti-deficiency statute.

Russell v. Roberts, 39 Cal. App. 3d 390, 114 Cal. Reptr. 305 (1974).

The maker of a purchase money note and trust deed requested an extension of time for payment of an installment, and in the extension agreement agreed to pay the note "unconditionally" and authorized the payee to release the security without affecting his liability. The security became valueless due to foreclosure of a senior encumbrance.

HELD: The maker of a promissory note may waive the anti-deficiency statutes (CAL. CODE CIV. PROC. §580b) by an agreement made after the sale and deed of trust transactions are completed even though it cannot do so at the time of sale and execution of the purchase money note and trust deed and the holder of the note may secure a deficiency judgment.

Clarifies right to waive anti-deficiency statute.

Tucker v. Lassen Savings & Loan Ass'n, 116 Cal. Reptr. 633 (1974).

The borrower entered into an installment land contract covering the property securing the loan. The trust deed contained a provision giving the lender the option to declare the loan due if the property was sold, alienated or further encumbered. The lenders commenced foreclosure proceedings based on this installment contract.

HELD: The installment contract did not impair the lender's security. The court discussed the decisions of *LaSala v. American Savings & Loan Ass'n,* 5 Cal. 3d 864, which held that the placing of a junior encumbrance did not justify automatic acceleration, and *Coast Bank v. Minderhout,* 61 Cal. 2d 311, which established the rule that only unreasonable restraints on alienation were prohibited and that the lender could accelerate upon an outright sale of property. A lender must show danger of impairment of the security where a junior encumbrance is added.

New analysis of acceleration clause based on sale, encumbrance and/or alienation.

Walker v. Community Bank, 10 Cal. 3d 729, 111 Cal. Reptr. 905 (1974).

As security for a loan the debtor executed two notes, one for the amount of the loan secured by a chattel mortgage on personal property, and the other for a lesser amount secured by a trust deed on real property. On default the creditor judicially foreclosed the chattel mortgage and secured a deficiency judgment and then started a foreclosure action on the real property. The foreclosure action on the real property was enjoined.

HELD: The creditor could have foreclosed on the real property by a sale under the power of nonjudicial sale in the trust deed and then judicially foreclosed the chattel mortgage since there would then be only one form of action under CAL. CODE CIV. PROC. §726 which permits only one form of action on a debt. Here, however, the creditor first judicially foreclosed the chattel mortgage and thereby lost his real property security and could not thereafter foreclose on it, having elected his remedy in the first action.

Atlas Garage and Custom Builders v. Hurley, 36 Conn. L.J. No. 16 p. 1 (1975).

Action to foreclose judgment lien against property formerly owned by owner-wife's husband against which action the wife filed a counterclaim. On November 1, 1968, the wife brought action for divorce against her husband, claiming alimony, support, custody, counsel fees and conveyance to her by him of his ownership of the property, and attached the property. On December 27, 1968, the creditor attached the husband's property in connection with an action for money damages and, after recovering judgment, recorded, on May 8, 1969, the judgment lien which is the subject of this action. On March 31, 1970, after obtaining judgment for the relief sought, the wife recorded her judgment. Trial court held that the wife's judgment, which included transfer of the property pursuant to CONN. GEN. STAT. §52-22, did not relate back to the date of her attachment, as did the creditor's judgment lien pursuant to §49-44, and only served to convey title to her as of the date of the divorce decree, February 3, 1970.

HELD: Affirmed. Attachments based upon actions seeking money demand out of property are quasi in rem actions pursuant to §52-279. These are distinct from actions brought to establish or enforce a previously acquired interest in the property, which are in rem actions pursuant to §52-325, the *lis pendens* statute. Here the wife is not enforcing a money demand against the property, nor may she attempt to apply the *lis pendens* statute. She merely seeks judgment ordering conveyance of the property which does not relate back to the date of her attachment.

Roundhouse Construction Corp. v. Telesco Masons Supplies Co., Inc., Case No. 15 22 55 (Super. Ct. Fairfield County, Conn., June 20, 1974) unreported.

Action by lienor against owners and junior lienors to foreclose mechanic's lien. The owners seek an injunction restraining prosecution of the action upon the ground that the mechanic's lien statutes, CONN. GEN. STAT. §49-33 and §49-34, violate due process as required under the fourteenth amendment of the United States Constitution. Mechanic's lien statutes provide for the recording of a lien, but do not provide a statutory procedure for an opportunity for a hearing prior thereto.

HELD: Injunction to issue. Under *Fuentes v. Shevin,* 407 U.S. 67, the constitutional right to be heard is designed to protect the use and possession of a person's property from arbitrary encroachment. Once a lien is recorded, there is no statutory authority to dissolve it, and even though he may bond it, the debtor is still deprived of his property. Under Connecticut procedure, there is no opportunity to be heard until the lien is actually foreclosed, which may be four years after recording.

Feemster v. Schurkman, 291 So. 2d 622 (Fla. App. 1974) (rehearing denied).

Feemster assigned a 20-year leasehold interest in an office building to Carribean Properties, Inc. In exchange for this agreement, Carribean Properties transferred to Feemster 10,000 shares of stock of the parent corpora-

tion of Carribean Properties. In addition, Carribean Properties granted to Feemster an option to (1) retain or dispose of the shares of stock or (2) exchange the stock for an $80,000 note secured by mortgage upon the leasehold interest, such mortgage to be subject to a first mortgage already existing on the property. The option agreement was recorded. Subsequently, Carribean Properties executed a note and mortgage in favor of Schurkman to secure a loan. This mortgage was then recorded. Upon default of this subsequent mortgage, Schurkman instituted suit to foreclose and named Feemster as claiming an interest in the property inferior to his mortgage. Feemster counter-claimed and alleged that the option agreement was prior in time and right to Schurkman's mortgage.

HELD: The option to create a mortgage created a valid interest in and encumbrance upon the real property, was supported by valuable consideration and was recorded prior to Schurkman's mortgage. Therefore, the option to create a mortgage is superior in time and right to the mortgage of the plaintiff.

Case of first impression.

Bennett Iron Works, Inc. v. Underground Atlanta, Inc., 130 Ga. 653, 204 S.E.2d 331 (1974).

Bennett Iron Works sued to foreclose a mechanic's lien for improvements to premises occupied under a 90-year lease by Underground Atlanta, Inc. Bennett sought judgment both in rem and in personam. Contract was actually with English Roadhouses, Inc., which had been declared bankrupt.

HELD: The holder of a long-term lease was a "true owner" as defined in the statute providing for liens of materialmen and the lien could be enforced against such lessee. Moreover, a personal judgment was available against the lessee. Under the statute there need be no contract directly between the true owner and the materialman so long as there was a contract between the true owner and another for erection of the improvements. Underground Atlanta and English Roadhouses did make an agreement for English Roadhouses to provide and install the improvements, with Underground Atlanta giving a rent credit of $5,000 or cash, as desired. The amount sought by Bennett was within the terms of the contract. Therefore, Underground Atlanta as owner could be charged with the lien.

Ingram v. Ingram, 214 Kan. 415, 521 P. 2d 254 (1974).

Action by divorced spouse to levy execution and sell the delinquent spouse's interest in a pledged oil and gas lease for unpaid alimony and support.

HELD: For the creditor/mortgage lender. A mortgage or assignment of an oil and gas leasehold interest for security purposes is to be treated as a real estate mortgage and such instruments are not subject to the provisions of the Uniform Commercial Code. Recordation of such a mortgage in the county mortgage records where the property is situated fixes the lien and imparts constructive notice to subsequent interests.

Case of first impression under the Kansas U.C.C.

R. L. Sweet Lumber Co. v. E. L. Lane, Inc., 513 S.W. 2d 365 (Mo. 1974).

This decision reaffirms the "lien theory" of mortgage law in Missouri. As a result, mortgagees and security interest holders are not legally characterized as "owners" for notice purposes when subcontractors file liens on the mortgaged property.

United States v. Eaves, 499 F.2d 869 (10th Cir. 1974).

To satisfy a federal tax lien against Joseph C. Eaves, which was his sole liability, the District Court ordered the sale of his undivided one-half interest as joint tenant in the residence owned by Eaves and his wife. The United States appealed, contending that the court should have ordered the sale of the entire property and provided that the value of the wife's one-half interest be set over to her.

HELD: Although it had the power to do so, the District Court also had the discretion, which it properly exercised, to order the sale limited to the husband's undivided one-half interest.

National Bank of Washington v. Equity Investors, 83 Wash. 2d 435 (1974).

A group of engineers, hereinafter called the McDonald group, sought to construct an apartment complex. McDonald sold the real estate involved to Equity Investors. A construction loan was obtained from the National Bank of Washington and was secured by a deed of trust recorded on May 19, 1969. The real estate contract was terminated and a deed of trust was issued which designated the McDonald group as beneficiary and was recorded on May 15, 1969. McDonald signed a subordination agreement to the bank. Columbia Wood Products delivered lumber to the construction project commencing May 26, 1969, and thereafter perfected its materialmen's lien. Lien foreclosure suits were subsequently filed by Columbia, McDonald and the bank.

HELD: Where advances of promised loan monies are largely optional under a loan agreement and the amounts to be advanced are within the lender's discretion, "the legal effect of such provisions is to bring the transaction under the rule for optional advances rather than the rule governing mandatory advances for the purpose of determining lien priorities."

As a result of this decision, liens which attach prior to an optional advance made pursuant to a construction loan agreement or other loan agreement will be superior to any liens for such advances even though the loan agreement had been recorded prior to any materialmen's or other type of lien.

XIII. Oil and Gas

Thaxton v. Beard, 201 S.E.2d 298 (W. Va. 1973).

Owner of land also owned 1/8 interest in oil and gas on his 50.5 acre tract. A tax deed including that interest was purchased from the county, and the purchaser leased his interest to Beard and also entered into a unitization agreement with owners of the adjoining oil and gas interests. Owner did not object to drilling of well by Beard. After it was determined

that the well could be a producing well, owner redeemed his interest and brought this action demanding full royalty on the 1/8 interest, thereby ignoring the provisions of the unitization agreement.

HELD: Tax deed did not convey 1/8 interest in oil and gas because it was based on a void assessment. Owner had option of (1) recognizing lease and receiving the proportional share under the terms of the lease and unitization agreement or (2) rejecting the lease and receiving 1/8 of the value of oil produced from well less 1/8 of the cost of discovery and production.

XIV. Planning and Zoning

City of Phoenix v. Superior Court, 110 Ariz. 155, 515 P.2d 1175 (1973).

Action by city to determine if a trial de novo may be held in the Superior Court to review decision of the Zoning Board of Adjustment.

HELD: The right of appeal to the Superior Court is limited to a review of the record of the board for undue haste, unfair procedures, mistakes of law, etc., and the applicable statute does not provide for a trial de novo.

Judicial recognition of a statutory departure from the normal rule in Arizona, which permits a trial de novo in appeals from rulings of administrative boards.

Keating v. Zoning Board of Appeals of the City of Saco, 325 A.2d 521 (Me. 1974).

A city building inspector issued building permits for the construction of multi-family dwellings. More than two months after the permits were issued, and after construction of the foundations for the structures had already been completed, a nearby resident "appealed" to the Zoning Board of Appeals from the building inspector's issuance of the permits. The city ordinance allowed such an appeal, but failed to specify any time limit within which the appeal had to be taken. The Zoning Board of Appeals revoked the permits, and the builder appealed the revocation, asserting that the initial appeal to the Board had not been timely filed.

HELD: Since the ordinance is silent concerning a period of limitation for filing an appeal to the Zoning Board of Appeals, a "reasonable" time is impliedly intended. A "reasonable" period of time within which an appeal must be taken to a Zoning Board of Appeals is 60 days from the date of the action or nonaction of the building inspector under attack. This appeal to the Zoning Board of Appeals was therefore untimely, and the board was without legal authority to revoke the permits.

Bellows Farms, Inc. v. Building Inspector of Acton, 303 N.E. 2d 728 (Mass. 1973).

On March 5, 1970, property owners obtained planning board's endorsement on plan for construction of apartment buildings that approval under subdivision control law was not required. Under zoning by-law in effect on that date, owner could have erected 402 apartments.

HELD: The property owner was subject to later enacted zoning laws

which permitted apartments but which, due to other requirements relating to off-street parking and intensity, reduced number of units to 203.

Limits scope of protection against subsequent zoning changes afforded perimeter plans under MASS. GEN. LAWS *Ch. 40A, §7A.*

Newton County Bank v. Jones, 299 So. 2d 215 (Miss. 1974).

Wife owned a farm which was mortgaged to bank by a deed of trust executed by wife and husband. Under Mississippi law, the husband has a homestead right rather than a common law marital rights, and the property involved was homestead property. The deed of trust had a dragnet clause by which it secured future advances, ". . . which beneficiary has made or may hereafter make to the grantor, or any one of them." Such advances were made to the husband without the wife's knowledge or subsequent ratification. The trial court enjoined the bank from foreclosing its mortgage on the grounds that section 89-1-31 of the Code, which required the wife's signature on the initial deed of trust, also required her assent to the future advance before it would be secured by the deed of trust.

HELD: Reversed. The language of the dragnet provision was sufficient to satisfy all statutory provisions protecting the spouses interest in the homestead property.

This case, decided 5-4 on rehearing and reversing the court's initial position, resolves a conflict among several Mississippi cases.

Monsey-Feager/Rouse-Waites v. McGuire, 510 S.W.2d 449 (Mo. 1974).

Pursuant to MO. REV. STAT. §89.100 (1969), aggrieved parties contested the St. Louis building commissioner's issuance of a building permit for a multi-story apartment building by filing a petition for a writ of certiorari with the clerk of the circuit court. The issue was whether such filing fulfilled the literal statutory interpretation of "presented" to the court.

HELD: The filing within the statutory period of 30 days invoked the jurisdiction of the court and constituted a presentment and notice to all parties even though a judge's examination and determination were not made.

Follow a liberal precedent established in New York and Virginia for identical statutes as that under consideration.

Shepard v. Woodland Twp. Comm., 128 N.J. Super. 379, 320 A.2d 191 (1974).

Action seeking a judgment declaring unconstitutional an amendment to a zoning ordinance relating to senior citizen communities, which provided that residency therein was limited to persons 52 years of age or over.

HELD: Such age requirement bears no realistic relationship to a recognized objective of zoning legislation.

Westfield Motor Sales Co. v. Westfield, 129 N.J. Super. 528 (1974).

The question presented is whether or not aesthetic considerations alone justify the exercise of the police power.

HELD: Municipality may, within the scope of its police power, enact a zoning ordinance based solely upon aesthetic considerations.

Case of first impression.

City of Ithaca v. County of Tompkins, 77 Misc. 2d 882, 355 N.Y.S. 2d 275 (Sup. Ct. 1974).

City sought to enjoin county from demolishing a building the City Commission has designated a landmark until it obtained a permit in accordance with the City's Landmarks Preservation Ordinance.

HELD: Preliminary injunction granted.

Ordinarily the county is not subject to zoning ordinances of another local government. However, section 96-a of the General Municipal Law makes historic zoning distinct from tradtiional zoning.

Lutheran Church in America v. City of New York, 35 N.Y. 2d 121, 359 N.Y.S. 2d 7 (1974).

New York City Landmarks Designation Commission declared plaintiff's property, the home of J. P. Morgan, Jr., a landmark which prevented plaintiff's free use of its land but was short of condemnation.

HELD: Such appropriation was confiscatory and therefore violates rights under the fifth and fourteenth amendments of the U.S. Constitution and sections 6 and 7 of Article 1 of the New York Constitution.

Camp Hill Development Co. v. Zoning Board of Adjustment, 319 A. 2d 197 (Pa. Commonwealth Court 1974).

Developer sought to erect 320 two-story townhouses in blocks of six or eight on a 20.5 acre tract in an R-1 residential zoning district claiming that the municipality's zoning ordinance prohibiting the erection of townhouses in the municipality was unconstitutional.

HELD: Municipality's zoning ordinance prohibiting townhouses is unconstitutional.

Presault v. Wheel, 132 Vt. 247, 315 A. 2d 244 (1974).

Action based on nonrenewal of building permit.

HELD: Where a valid building permit is issued for a specified period, and where construction is delayed past that time by litigation involving parties with standing to oppose construction, a permittee otherwise proceeding in good faith is entitled to reissuance of that permit, even when the zoning ordinance is changed in the interim.

Adopts rule followed in other jurisdictions.

XV. Public Lands

Muir v. City of Leominister, 317 N.E.2d 212 (Mass. 1974).

HELD: The rule that public lands devoted to public use cannot be diverted to another inconsistent public use without plain and explicit legislation authorizing the diversion applies only to lands which are in fact devoted to one public use through either prior legislative authorization of a taking for a particular public purpose or a prior public or private grant restricted to a particular public purpose. When the deed through which city acquired title was an unrestricted deed, not a limited grant for a particular use or purpose, there was no formal dedication by the city of the area as park land.

Refines the rule laid down in Robbins v. Department of Public Works, *355 Mass. 328, 244 N.E. 2d 577 (1969).*

Haaq v. State Board of University and School Lands, 219 N.W. 2d 121 (N.D. 1974).

Action to quiet title was brought against state by purchasers of original grant lands. The state claimed that its patents to purchasers were void because the land in question was "coal land" which the state was forbidden to sell by its constitution or, alternatively, that the state held 50 per cent of the coal underlying the land.

HELD: Determination by the Board of University and School Lands that land is not "coal land" and issuance of purchase contract thereon is conclusive on the state, in the absence of fraud or bad faith; discovery of commercially valuable coal deposits subsequent to determination by board that lands were not "coal lands" did not retroactively create a mutual mistake of fact which would be grounds for avoiding contract for deed; statutory provision that, in every transfer of land by state or any department thereof, 50 per cent of all oil, natural gas or minerals which may be found on or underlying such land shall be reserved to the state applies according to its terms to all sales of state lands, and the fact that the original grant of lands may have been designated as not being "coal lands" does not alter the right of the state to make such reservation.

XVI. Taxation

Pima County v. American Smelting & Refining Co., 21 Ariz. App. 406, 520 P.2d 319 (1974).

Action by lessee of mining properties to recover property taxes paid under protest. The lands in question were part of an Indian reservation.

HELD: The fee interest in the minerals underlying the reservation is held by the United States in trust for the Indian tribe. Absent enabling state legislation, mere leasehold interest is not subject to property taxation.

Case of first impression.

Columbia Bank for Cooperatives v. Blackmon, 232 Ga. 344 (1974).

HELD: The activities of the out-of-state lender within the state of Georgia constituted sufficient minimum contact to subject its long term notes secured by Georgia real estate to the Georgia Intangible Personal Property Tax statutes. *(Cf. First Federal Savings & Loan Ass'n v. Abbott, infra.)*

First Federal Savings & Loan Ass'n v. Abbott, 231 Ga. 864, 204 S.E.2d 594 (1974).

A long term promissory note in favor of an out-of-state federal savings and loan association was executed and delivered in New York by a Georgia corporation, secured by a deed to secure debt conveying real estate located in Georgia. As a prerequisite to recording in Georgia, the association had to pay the intangible tax imposed by section 92-164. The tax was paid under protest and claim for refund filed. The association does not have a place of doing business in Georgia and has no agents doing business for it in Georgia.

HELD: The tax imposed by section 92-164 is a one-time tax on intangible property, namely, long term promissory notes secured by real

estate, and for Georgia to impose such a tax the taxable situs of the note or notes must be in Georgia. That was not the case here as the taxable situs of the note in question was in New York. The association's claim of refund was allowed.

Case of first impression.

Joseph v. McNeive, 215 Kan. 270, 524 P.2d 765 (1974).

HELD: The State Board of Tax Appeals may not sue or be sued; thus, even an injunctive action may not be maintained against the board.

Overrules Builders, Inc. v. Board of County Commissioners, *191 Kan. 379, 381 P.2d 527 (1963).*

City of Auburn v. Mandarelli, 320 A.2d 22 (Me. 1974).

Mandarelli bought a parcel of land upon which a tax lien certificate had been recorded. The purchase occurred during the 18-month statutory period of redemption provided by 36 ME. REV. STAT. ANN. §§942 and 943. Upon expiration of the statutory period, the municipality brought action under section 946 to confirm its title to the premises. Judgment was entered in favor of the municipality. The tax lien was in the amount of $399 and the purchase price of the property was approximately $27,000. The purchaser appealed the judgment, claiming that the above statutes violated procedural and substantive due process and constituted a taking without just compensation in violation of the fifth and fourteenth amendments to the United States Constitution.

HELD: (1) Procedural due process is afforded through the statutory requirements of notice, recording and period of redemption. The notice and hearing requirements of *Fuentes v. Shevin,* 407 U.S. 67 (1972), do not apply to a municipal tax lien, since reasonable statutory safeguards are provided, consistent with the exercise of the power of the state to collect taxes expeditiously. (2) The retention by the city of property worth far more than the amount of the tax lien did not result in a deprivation of property without the due process of law, since adequate steps were taken to notify the landowner who then failed to act seasonably. (3) There is no unjust enrichment to the municipality, where the loss of property is chargeable to the landowner's own failure to act.

Norvell v. Sangre de Cristo Development Co., Inc., 372 F. Supp. 348 (D. N. M. 1974).

Suit by New Mexico against non-Indian corporation which has entered into a 99-year lease with an Indian tribe under which the lessee corporation proposes to develop the leased land as a subdivision of homes, with commercial and recreational facilities for use and occupancy by non-Indians, wherein the state seeks to compel the lessee corporation to comply with the state liquor licensing law, the construction industries licensing act, the platting and planning authority of the county under the Land and Subdivision Act, and the Water Quality Act governing water supplies and sewage disposal, and to pay an ad valorem tax on its leasehold interest and its improvements on the leased land, and a gross receipts tax. It is argued that (1) the state, by its enabling act and constitution, having disclaimed

all right and title to lands owned by Indian tribes, lacked jurisdiction over the lessee's development, (2) the field of regulating such developments had been preempted by the United States and (3) the tax exempt status of the land would inure to the benefit of the lessee.

HELD: The state laws in question are applicable to the lessee corporation. Congress has not preempted the field of regulation here at issue and 25 C.F.R. §1.4 issued by the Secretary of the Interior, which in terms does purport to preempt the field, is beyond authority granted by Congress. The statutes here sought to be enforced by the state against the lessee do not infringe upon the right of the Indians to make and be ruled by their own laws; the involvement of non-Indians is to such a degree that state jurisdiction is called into play. The lessee's interest in the leased lands could be taxed as separate from the fee interest of the Indian tribe, although it could not create a lien on the land. The gross receipts tax is applicable; the Supreme Court has held that tribal enterprises conducted upon tax exempt land are themselves subject to the state's gross receipts tax.

This case in effect overrules Sangre de Cristo Development Co., Inc. v. City of Santa Fe, *84 N.M. 343, 503 P.2d 323 (1972), and subjects the operations of land developers within Indian lands to the same statutory regulations and taxes as apply to similar operation on non-Indian lands.*

Association of the Bar of the City of New York v. Lewisohn, 34 N.Y.2d 143, 356 N.Y.S. 2d 555 (1974).

For many years the Association had enjoyed exemption from real property taxes due to a statute. In 1972, a new statute was passed allowing local government to assess real property taxes after passing a local ordinance if the property is owned by an association not organized or conducted exclusively for religious, charitable, hospital, educational or cemetery purposes, or for two or more such purposes, but which is organized or conducted exclusively for the moral or mental improvement of men and women or for . . . bar association . . . purposes. . .

HELD: Statute was constitutional and not in violation of due process or equal protection of the law as association is not organized and conducted principally for charitable or educational purposes.

University of the South v. Franklin County, 506 S.W. 2d 799 (Tenn. 1974).

TENN. CODE ANN. §67-502(8) provides exemption from taxation for "Leasehold estates and improvements thereon, in the hands of the lessee, holding under incorporated institutions of learning in this state, when the rents therefor are used by said institutions for educational purposes, where the fee in the same is exempt from taxation to said institutions of learning by charter granted by the State of Tennessee."

HELD: To the extent that section 67-502(8) purported to grant tax exempt status to a leasehold estate not being used for a purpose which was purely religious, charitable, scientific, literary or educational, the statute was unconstitutional and void.

This is a further narrowing of Methodist Church South v. Hinton, *92 Tenn. 188 (1893). The case is consistent with the majority view that the*

fact that proceeds realized from a leasehold interest are used for educational or charitable purposes does not in itself justify the exclusion of that property from the tax rolls of the state or municipality.

Andrews v. Lathrop, 132 Vt. 256, 315 A.2d 860 (1974).

Declaratory judgment action involving Vermont Land Gains Tax Act.

HELD: Land Gains Tax levy is not violative of equal protection provisions of United States or state Constitutions, and enactment of Act was not an improper exercise of legislative power, even when purpose of measure was solely to raise revenue.

Perkins v. County of Albemarle, 214 Va. 416, 200 S.E. 2d 566 (1974).

HELD: Piecemeal assessment employed by county in implementing system of annual assessment for real estate tax purposes was unconstitutional since it violated mandate that all taxes shall be uniform upon same class of subjects.

XVII. Tort and Nuisance

Jensen v. Maricopa County, 522 P. 2d 1096 (Ariz. 1974).

Action for personal injuries by a motorcyclist who ran into a steer while driving at night on a county highway. No warning signs were posted. Summary judgment granted for county was reversed on appeal.

HELD: Where the county had actual knowledge of several previous accidents involving cattle in the same area, it had a duty to warn of the danger. This is true despite the fact that the nuisance was a private one and the owner of the land from which the cattle came was relieved of responsibility by the Arizona "open range" law.

A municipality may be liable for a private nuisance.

U.S. Financial v. Sullivan, 37 Cal. App. 3rd 5, 112 Cal. Reptr. 18 (1974).

The lender who financed a development discovered defects in the lots and homes and sued the developer and others involved in the development for damages for impairment of its security.

HELD: The lender can recover for the negligence of the developer, designer or contractor which impairs its security, but does not have the benefit of the doctrine of strict liability in tort.

Clarifies law on lender's rights.

Gardner v. Sailboat Key, Inc., 295 So. 2d 658 (Fla. App. 1974).

Taxpayer sought to enjoin the development of an island in Biscayne Bay pursuant to the city of Miami having zoned the island to allow the construction of four high-rise residential buildings and related facilities, alleging that even if the island was developed and operated in strict accord with all zoning and building laws as authorized by the city of Miami it would be a public nuisance. The trial court dismissed the action. On appeal it was held that the zoning of the property for certain uses constituted municipal legislation, and that such municipal legislation had the effect of immunizing the authorized use from being held to be a public nuisance. Subsequently, an application for a hearing was granted.

HELD on rehearing: The trial court committed error in dismissing the complaint. Notwithstanding authority to the contrary in other jurisdictions, the use of property in compliance with zoning ordinances may constitute a nuisance per se. Remanded for further proceedings.

An expansion of the holding in Shevin v. Tampa Electric Co., *291 So. 2d 45 (Fla. App. 1974), adopting a view contrary to the weight of authority in other jurisdictions.*

Hammond v. Allegretti, 311 N.E.2d 821 (Ind. 1974).

Woman brought suit to recover for injuries sustained when she slipped and fell in an icy, open-air parking lot owned and operated by a doctor in conjunction with his clinic.

HELD: The trier of fact must take into account the condition of the premises and the actions or inactions of the inviter to determine if reasonable care has been exercised. It is the duty of the inviter to take all reasonable care to preserve the safety of the invitee.

Overrules Kalicki v. Bacon Bowl, Inc., *143 Ind. App. 132, 238 N.E. 2d 673 (1968), which had held that a landowner-inviter does not owe a duty to a business invitee to clear the natural accumulation of snow and ice from an open-air parking lot.*

McDonough v. Whalen, 313 N.E. 2d 435 (Mass. 1974).

Consolidated actions by purchasers of homes against persons who designed and installed septic system for builder for personal injuries and propery damages allegedly caused by a negligent design and installation.

HELD: A builder or contractor may be liable for injuries caused by his negligence to persons with whom he has no contractual relation and even though his work is completed and accepted by the owner before the injury or damage occurred. Liability will be imposed, however, only if it is foreseeable that the contractor's work, if negligently done, may cause damage to the property or injury to persons living on or using the premises.

Overrules Cunningham v. T. A. Gillespie Co., *241 Mass. 280, 135 N.E. 105 (1922).*

Pennsylvania v. Barnes and Tucker Co., 319 A.2d 871 (Pa. 1974).

A coal mine company engaged in deep mining for some 30 years until the mine was sealed. The abandoned mine began to inundate the surrounding area with acid mine drainage. The Pennsylvania Department of Environmental Resources sought a preliminary and permanent injunction requiring the coal company to treat the acid mine drainage, citing amendments to the Pennsylvania Clean Streams Law, alleging that the discharge of acid mine drainage constituted a nuisance.

HELD: Although the state could not prevail under the arguments based on the Pennsylvania Clean Streams Law, the discharges amounted to both statutory and common law nuisances and, therefore, had to be abated.

Overrules Pennsylvania Coal Co. v. Sanderson, *113 Pa. 126, 6 A. 453 (1886). The court remitted the case to a chancellor in equity to take additional testimony so as to be able to fashion an appropriate decree.*

Rosenthal v. Kurtz, 62 Wis. 2d 1, 213 N.W.2d 741, rehearing denied 216 N.W.2d 252 (1973).

HELD: Period of statute of limitation for cause of action against architect for negligent design and supervision of building construction project commences at the time all construction on the improvement to real property has been completed.

Case of first impression which may be limited on the facts to situations where the defect is discovered within the statutorily applicable six-year period after completion of construction. The court does not foreclose consideration of the discovery rule upon an appropriate factual setting.

XVIII. USURY

Lakeview Meadows Ranch v. Bintliff, 36 Cal. App.3rd 418, 111 Cal. Reptr. 414 (1974).

Creditor held a note secured by a trust deed executed by debtor. A principal installment of $510,000 was due July 14, 1968 and the debtor advised the creditor that it could only pay $100,000 and accrual interest. Creditor agreed to extend the time for payment of the $410,000 until December 1968. Debtor's attorney drew up a Modification Agreement as to the trust deed covering this extension and increasing the rate from 6 to 9 per cent on the unpaid balance commencing July 15, 1968. Debtor claims that the rate of interest is usurious since the payment of $410,000 was extended six months and the 9 per cent was charged on the entire balance of $1,020,000.

HELD: On default by debtor the creditor could declare the entire balance due and therefore the payment of entire balance was extended. Creditor had no intent to charge usury, which is a required element of usury.

XIX. VENDOR AND PURCHASER

Pollard v. Sax & Yolles Development Co., 12 Cal.3rd 374, 115 Cal. Rptr. 648 (1974).

Shortly after purchasers bought newly constructed apartment buildings from developers, they became aware of a buckling ceiling, sticking doors and improper rain drainage. They did not notify developers of the defects until almost four years later and sued for breach of warranty.

HELD: The doctrine of implied warranty of quality and fitness applies to sales of newly constructed real property. However, notice of the breach must be given within a reasonable time. Here purchasers delayed too long and their action was barred.

New law on warranty and notice of breach.

Skendzel v. Marshall, 301 N.E.2d 641 (Ind. 1973).

In December 1958, the vendor entered into a land sale contract with purchasers which provided for installment payments, other obligations of purchaser and forfeiture without notice of all previous payments in the event of default by purchaser. Payments had been made in the amount of

$21,000 toward a purchase price of $36,000 when purchasers defaulted. Vendor brought action against purchasers to obtain possession of the real estate in question through enforcement of the forfeiture clause in the contract.

HELD: The cause is reversed and remanded with instructions to enter a judgment of foreclosure on vendor's lien. The liquidated damages provision in the contract provided for excessive forfeiture in this case and a conditional land sale contract is in the nature of a secured transaction, the provisions of which are subject to all proper remedies at law and equity, including enforcement through foreclosure proceedings. Forfeiture is not an inappropriate remedy for some breaches of a land contract such as a case of abandonment by the purchaser or where the purchaser has paid only a minimal amount of the purchase price at the time of breach and has little or no "equity" in the property.

Subsequent to Skendzel v. Marshall, *two lower court cases in Indiana passed on the forfeiture clause in installment sales contracts. In* Tidd v. Stauffer, *308 N.E. 2d 415 (Ind. App. 1974),* Skendzel *was followed and judicial foreclosure was ordered on the basis that the purchaser had paid $16,000 of a total purchase of $39,000. In* Goff v. Graham, *306 N.E. 2d 758 (Ind. App. 1974),* Skendzel *was cited, but foreiture was allowed as an exception to the general rule in* Skendzel. *In* Goff, *the purchaser willfully breached after having paid only $2,000 of a purchase price of $61,000.*

Fudge v. Byrom, 191 Neb. 363, 215 N.W.2d 71 (1974).

Suit by contract purchaser for specific performance against contract seller together with abatement of agreed price because of failure of seller's spouse to sign sale contract.

HELD: Lower court properly refused to abate purchase price to compensate for nonsigning spouse's marital rights, which would not be affected by the transfer.

This is essentially a case of first impression on this issue and the court followed the minority view.

Nance v. Schooner, 521 P.2d 896 (Utah 1974).

Action by purchasers against vendors for specific performance of option to purchase real property. Purchasers paid the vendor with a personal check to obtain a deed to the property. Option agreement stated it was to be paid in cash.

HELD: Option to purchase real estate must be exercised in accordance with its terms. The payment of $17,000 cash in the tender of a personal check in lieu of cash did not comply with the terms of the agreement.

XX. Water and Water Courses

City of Daytona Beach v. Tona-Rama Inc., 294 So. 2d 73 (Fla. 1974).

Taxpayer suit to enjoin construction by record title holder of a sightseeing tower on the dry sand area of Daytona Beach. The public used the beach much longer than the 20-year prescriptive period and during that time the city furnished police, sanitation, life guard and other mu-

nicipal services normally provided to city owned beach property. The District Court of Appeals affirmed the trial court's determination of a prescriptive easement in favor of the public and removal of the tower built during the litigation.

HELD: Remanded for purpose of entering final judgment for owner. Use by public is not adverse to owner who also owned adjoining pier that relied on beach users for its business. Even if a prescriptive easement had been acquired the owner may make use of his land in a way which does not interfere with the exercise of the easement by the public. The Sky Tower which occupies only an area of 17 feet in diameter does not interfere with such easement if it existed nor with the public's right to use the dry sand area gained through customary use of the area without dispute and interruption for many years.

Templeton v. Huss, 311 N.E.2d 141 (Ill. 1974).

Subdividers converted farmland into residential subdivision. Allegedly because of the construction, water from the same watershed went onto adjoining farmland in greater amounts and at faster rates than prior to construction of subdivision. Trial court granted subdividers' motion for summary judgment since the water had not been diverted from another watershed.

HELD: The owner of dominant estate has no unlimited right to alter the surface water drainage of his land even if there is no diversion from another watershed. The issue is whether the increased flow of surface waters over a servient estate is reasonable.

Oliver v. Milliken & Farwell, Inc., 290 So. 2d 738 (La. 1974).

HELD: In the division of alluvion, it is apportioned as of time suit to divide is commenced. As to the method of division, the lower court was correct in using the frontage to frontage method where it produced the fairest results for all riparian owners.

State v. Placid Oil Co., 300 So.2d 154 (La. 1974).

The state and its mineral lessee brought an action to determine the ownership of land located below the ordinary highwater known as Grand Lake-Six Mile Lake.

HELD: As to lakes, adjacent landowners have no alluvial rights. In considering whether a body of water is a lake, the existence of accretion-forming current is not by itself decisive of stream classification and importance is placed upon classification in 1812 when Louisiana was admitted to the Union. Therefore, Grand Lake-Six Mile Lake, being a wide, irregularly shaped body of water of great size, relatively shallow in depth, with slow current, was a lake and the state owned its bank and the accretion rules do not apply.

Blaney v. Rittall (two cases), 312 A.2d 522 (Me. 1973).

Brown Brothers, Inc., planning to extend a wharf on its coastal property in Boothbay Harbor, Maine, applied for permits under the Wetlands Act from the Board of Selectmen of Boothbay Harbor and from the Wetlands Control Board of the state of Maine. After public notice and hear-

ing, a permit was granted. Following the issuance of the permit, an adjoining landowner appealed, based on the old Wharves and Weirs statute, which concerns the building or extension of wharves, weirs and traps in tidewaters, and the more recent Wetlands Act, which concerns the alteration of coastal wetlands.

HELD: (1) The Wetlands Act did not repeal by implication the earlier Wharves and Weirs statute; and therefore, two permits, one under each of the Acts, are required before construction of a wharf on coastal wetlands. While both statutes operate upon the strip of land which lies between the high and low water mark, the purposes and concerns of the two statutes are not identical; thus, the enactment of the Wetlands Act, which is not inconsistent with or repugnant to the earlier enactment, did not effect the repeal of the Wharves and Weirs statute. (2) Recording of the permit in the Registry of Deeds, as required by the Wetlands Act, was not valid because effective public notice was not given when the recorded permit referred to an "attached sketch" for a description of the property and the sketch was not recorded.

Opinion of the Justices, 313 N.E. 2d 561 (Mass. 1974).

The House of Representatives asked the Supreme Judicial Court for an advisory opinion relating to the constitutionality of a bill creating a public "on-foot free right-of-passage" along the shore of the coastline between the high water line and the extreme low water line, subject to certain restrictions. The justices were of the opinion that the bill, if enacted, would violate the provisions of the constitutions of the Commonwealth and of the United States which prohibit the taking of property for public purposes without due compensation. The colonial ordinance which granted private ownership rights in littoral land subject to the retention of public rights of fishing and navigation did not vest the Commonwealth the right to allow all significant public uses in the seashore including the public interest in recreation.

Court declined to extend the public trust doctrine.

Miller Land Co. v. Liberty Township, 510 S.W. 2d 473 (Mo. 1974).

Action to require township board to remove drainage tile from a railroad roadbed because surface water was surcharging the servient estate.

HELD: The local governmental body exceeded its discretionary power by installing the drain tiles which caused the drainways between dominant and servient lands to be unnaturally overburdened. The common enemy doctrine is thus modified to the extent that one landowner may not always divert surface waters regardless of damage to neighboring land.

The case presents a unique factual situation; however, the decision is in opposition to Camden Special Road District of Ray County v. Taylor, *495 S.W. 2d 93 (Mo. App. 1973), but in accord with* Haferkamp v. City of Rock Hill, *316 S.W. 2d 620 (Mo. 1958). There is some question whether the common enemy doctrine is significantly altered as a result of this case.*

May v. Torres, 86 N.M. 62, 519 P.2d 298 (1974).

Suit by rancher seeking determination of rights to water from "China

Draw," seeking injunction to prevent adjoining landowner from withdrawing more than his share of the water, and for damages due to unlawful diversion of waters. Trial court dismissed it because neither party had obtained a license from the State Engineer to withdraw waters.

HELD: Fact that neither party had secured a permit from the state beneficially to use the waters did not necessarily prevent the acquisition by either or both of rights to the beneficial use of waters from the draw by appropriation, and did not necessarily prevent the acquisition of rights to the use of these waters by either party as against the other. If the draw does constitute a natural stream or watercourse, if there are unappropriated waters therein and if the parties have been making beneficial use thereof as alleged, then they are entitled to have their respective rights to such use and to the flow of such waters adjudicated as between themselves, even though this adjudication will not affect the rights of the state in such waters.

State v. Michels Pipeline Construction, Inc., 63 Wis. 2d 278, 217 N.W. 2d 339, 219 N.W. 2d 308 (1973).

A sewer was installed on the owner's land. The installation lowered the ground water table, causing various degrees of reduced capacity in neighbors' wells, as well as property damage to foundations, basement walls and driveways on neighboring realty. Trial court sustained demurrer.

HELD: Reversed and remanded. A cause of action is recognized for interference with another's ground water.

Overrules Huber v. Merkel, *117 Wis. 355, 94 N.W. 354 (1933) and its progeny which set forth the English common law rule; adopts the rule of Tentative Draft No. 17, Restatement (Second) of Torts §858A (1971), to the exclusion of both the reasonable use and correlative rights rules.*

XXI. MISCELLANEOUS

Abbott v. Bristol, 36 Conn. L.J. No. 8, p.1 (1974).

Action pursuant to section 48(c) and (e) of the Bristol City Charter for appointment of appraisers to ascertain depreciation of adjoining land due to construction by city of a large water tank on its land. City demurred upon the ground that no right of action occurred since the use was lawful. Trial court overruled the demurrer and granted the application.

HELD: Affirmed. City Charter provided for payment of damages by the city [for] "the taking of any land . . . or any other things done. . . ." This is analogous to CONN. GEN STAT. §16-236 which is not a condemnation statute, but an establishment of a method of controlling the erection, by public service companies, of water tanks and other enumerated structures.

Cranston v. Commercial Chemical Corp., 324 A.2d 301 (Me. 1974).

A real estate attachment was obtained prior to August 1, 1973, under the old version of Rule 4-A, Maine Rules of Civil Procedure, which allowed such attachments without prior notice and hearing. On August 1, 1973, Rule 4-A was amended to require prior notice and hearing to de-

fendant before any attachment could be ordered. This case challenged the validity of an attachment brought under the old rule without pre-attachment notice and hearing.

HELD: A three-judge federal District Court decision, declaring the old Rule 4-A unconstitutional under *Fuentes v. Shevin,* 407 U.S. 67 (1972), was prospective in effect only. Attachments made under the old rule without notice or hearing are not invalidated by the finding of unconstitutionality and the consequent adoption of the new rule.

Case upholds the validity of all attachments made prior to the time that the procedure for obtaining them was found to be unconstitutional.

Hendrickson v. Sears, 310 N.E. 2d 131 (Mass. 1974).

HELD: A client's cause of action against an attorney for negligent certification of title to real estate does not accrue for limitations purposes until the misrepresentation is discovered or should reasonably have been discovered.

Case of first impression.

Rothman v. Rothman, 65 N.J. 219, 320 A.2d 496 (1974).

After a divorce, the matrimonial court made an equitable distribution of property acquired during marriage, but prior to the effective date of the equitable distribution provisions of the 1971 divorce reform law.

HELD: The statutory provision is intended to apply with respect to all property acquired during the marriage, whether before or after the effective date of enactment.

Upholds constitutionality of retrospective application of equitable distribution provisions of 1971 divorce reform law.

DiCristofaro v. Beaudry, 320 A.2d 597 (R.I. 1974).

Will contained three clauses which provided that (1) debts should be paid, (2) "All the rest, residue and remainder of my estate, real, personal and mixed, of which I shall be seized or possessed, or to which I shall be in any way entitled at the time of my decease . . . . I devise, bequeath . . . . absolutely and in fee simple, to my (two children)," and (3) that a certain child should be executor. The executor, under R.I. GEN. LAWS §33-12-6, (1956, 1969 Reenactment) petitioned for leave to sell, this section allowing such a petition to sell for a prompt and efficient settlement of the estate, save only that this could not be done where the property is specifically devised, unless the specific devisee consents thereto in writing. No such written consent was obtained. The petition was granted. The trial court ruled the devise to be general in nature.

HELD: The "rest, residue and remainder" clause is general in nature and it was immaterial that testatrix, both when the will was drawn and when she died, owned the same property and none other.

Case of first impression.

Trustees of Columbia Academy v. Board of Trustees, 202 S.E. 2d 860 (S.C. 1974).

Action by trustees of private academy for judgment declaring a legislative act to be unconstitutional.

HELD: Statutory provision which purported to repeal statutory charter of private educational academy and to vest in public school district without compensation the real estate acquired by the academy from the state under the charter constituted a confiscation of academy's property in violation of state and federal constitutions.

Case of first impression.

West v. Tennessee Housing Development Agency, 512 S.W. 2d 275 (Tenn. 1974).

HELD: The constitutionality of the Tennessee Housing Development Agency as created by Chapter 231 of the Public Acts of 1973 is confirmed. Basically, this Act provides for a housing development agency, which is given the power to issue tax exempt bonds in order to make mortgage money available for low and moderate income housing.

Jones v. Jones 214 Va. 452, 201 S.E.2d 603 (1974).

HELD: In absence of agreement to contrary, the proper measure of compensation allowable to a joint tenant upon partition is not the sum spent in improving the land but the enhanced value of the land resulting from the improvements.

Respectfully submitted,

The chairman acknowledges the substantial contribution made by William J. Dutel of New Orleans, LA, law student, as well as William M. Champion of University, MS, Ward Dunphy of Milwaukee, WI, Judson L. Owen, III of Miami, FL, and Stanley E. Price of Little Rock, AK, attorneys not memebrs of the committee.